ENGLISH CUSTOMARY TENURE IN THE TUDOR PERIOD.

I. Russian Interest in English Agrarian History.

An American or an English student who publishes the results of his studies on English agrarian history need make no long introductory remarks; but a Russian studying the rural changes of the Tudor period should perhaps explain the ground of his interest in the subject. He may seem to be working at a great disadvantage. He does not possess the local knowledge which makes antiquarian research so much easier for many English scholars. He does not breathe the happy atmosphere of the common law. He is not accustomed either to great wealth or to intense economic intercourse. Therefore, he is apt to err in his *Rückschlüsse* from the present conditions of English life.

But, if he long remains a stranger in a London street and in a Lancashire mill of to-day, he may feel himself more at home amidst the open fields and lonely wastes of a Tudor manor. The contemporary Russian village retains many traits which may seem archaic to a Western eye. Yet the Russian rural conditions of to-day are by no means identical with those of the Tudor period. During the last three centuries we have, in our own manner, passed through an evolution analogous to that of the happier Western peoples. When our so-called patriotic journalists are extolling the freshness of the race unspoiled by Western civilization, they suffer from a short-sighted delusion, unless they be guilty of hypocrisy. We were included in the community of

Christian nations no later than the Scandinavians. We had feudal institutions of our own at the same time with the French and the English. The political unification of the huge Muscovite czardom and the formation of the Great Russian nationality had been brought to an end perhaps before the corresponding events took place in the France of the Valois or of the Bourbons. As to the development of the bureaucratic autocracy, we may claim the dubious honor of priority over some Western societies. The enlightened despotism of the eighteenth century numbers two Russian monarchs among its most illustrious representatives. During the last century, at least, the upper classes of Russian society were eagerly imbibing all the streams and rivulets of Western thought and belief. A cultivated Russian of to-day is in his ideas not behind a cultivated American or Englishman. I am afraid, he too often,—and hardly to his own advantage,—is some steps in advance of the latter. We may be a backward nation: we are not a virgin soil. Not a childish innocence, but causes far deeper and gloomier, are lying at the root of our numerous and conspicuous shortcomings. We have listened to the instructive lessons of European history. We have not yet been able to master them, and to profit by them as we ought.

However, the capital fact remains. Taken as a whole, the present conditions of Russian life, though perhaps concealing a great future, are much behind those of Western Europe and of the United States. A foreign observer, especially at the present moment, grasps more easily the political and military side of the situation. For a Russian the economic and social aspects of the question are even more ominous. Is it not futile to expect real political progress and solid military strength from a country where, for a large majority, the economic

standard of life is very low, and where the "masses" for the most part live in scattered villages, hardly conscious of their own collective interests, not to speak of higher national aims and ideals?

A foreigner here, again, must be on his guard against excessive simplification of Russian economic conditions, which are no longer primitive and rudimentary. We have our railroads and banks, as well as great factories, though they are few in comparison with the West. There is plenty of *Hausindustrie* in the villages. Our minister of finance has at his disposal a large staff of trained officials, and our budget is the greatest of the world. Our sugar distillers have thoroughly studied the art of trust-forming and of dumping. But do the just mentioned concomitants of an advanced society penetrate deeply enough into the daily life to put their definite stamp on the whole national economy? In spite of the rapid growth of manufacturing concerns and mining enterprises, agriculture of a raw type remains the staple national industry. Peasant proprietors have in their hands about two-fifths of the whole territory. They cultivate on their own behalf much more than that, because they hold under leases a considerable part of the land which belongs to the state and to the nobles. With few exceptions they practise still the three-field system. Among the peasants communal property prevails over individual ownership. The holdings still consist of narrow strips scattered over numerous shots of the open fields; and periodical redivisions of the whole arable, though becoming *rarer*, are by no means unknown. The land laws of the Russian empire do not apply to the peasant communal soil. Succession in land, alienation of land, complicated relations between communal and individual, or rather family, rights in land, are regulated by the local unwritten custom, which is supposed to guide the village moot

and the district court, where a few elected peasants act as assessors and judges, now, however, under the strong influence of officials nominated by the government from amongst the local gentry. Every Russian of average intelligence, who lives in the country or spends there his holidays, without any effort of historical research and imagination, learns from immediate observation and daily intercourse the essential features of the mediæval economic system. Perhaps I may be right in describing this as an advantage for a student of English agrarian history.

And the legislators have taken care that this state of things should last as long as possible. The government, not without good reason of its own, considers the existence of a numerous class of peasant proprietors as a necessary condition of a sound autocratic and bureaucratic régime. Therefore, inalienability of communal land to non-members of the local peasant community is a settled principle of policy in our land laws.

But the Russian legislators are not all-powerful. They do their best to prevent radical innovations in the village of to-day, yet they are helpless to achieve their end. Some still stronger forces are at work; and, in the opinion of every conscientious observer, important changes are going on in our country life. The more conspicuous changes took place and are still proceeding on the land belonging to the nobles. Since the emancipation of the serfs, the nobility, as a whole, has lost a considerable part of its landed property, which has passed partly into the hands of the peasants, but chiefly into those of a new middle class of very mixed composition: (1) bankers, great merchants, and manufacturers; (2) professional people of all kinds, many of them officials; (3) small merchants, well-to-do artisans, publicans. And the land that remained with the nobles has often changed its proprie-

tor. The small country gentlemen, whose own resources are insufficient, and who humbly apply to an influential official or court favorite for a lucrative office in the local government, for a gratuitous education of their children in the privileged state schools, for an additional mortgage loan at low interest in the nobility state bank, these were and are still the representatives of state power in the country life, being a handy tool and a docile instrument of governmental policy. But they are decreasing in numbers and giving way to nobles of a more independent type. The noble estates are becoming concentrated in the hands of well-to-do gentlemen farmers, who understand very well how to manage their budget and to make the utmost profit out of their land, or else these estates are kept by the very rich magnates, who stand near the court, and are wont to give orders, not to receive them.

The changes in the peasant households, perhaps less on the surface, are hardly less significant. For a long time the cultivated Russians, though they could not deny the great poverty of their peasants, thought honestly and with a certain pride that the sad picture had its good side, and that Western pauperism was unknown on Russian soil. They could retort that vastness of territory, comparative scarcity of population, prevalence of communal property, with its equal distribution of land, allowed the average peasant family to have its own holding and farming stock, and guaranteed to the great majority of population at least the necessary minimum of existence and the happiness of economic independence. Whatever be the applicability of that opinion to the past, almost all observers agree that the situation of to-day is much different. The peasant population grows much faster than the area of landed property in the hands of the peasants. The methods of peasant farm-

ing are, undoubtedly, improving in some localities, but in very many cases they remain stationary; and, where they are improving, it is only at a slow pace, which cannot satisfy the demand for agricultural produce, or rather for money which can be realized for it. The peasants are thirsting for land; and there has been a most remarkable rise in prices of land, especially in recent years. Where the peasants cannot buy the land, they are taking it on leases in the neighborhood; and, under the pressure of economic necessity, they are willing to pay high or even enormous rents. The area of peasant leaseholds is already very considerable, and it has a tendency to increase. The moujik becomes at the same time landed proprietor and leaseholder. And the leaseholder is of the unhappiest kind, as his leasehold interest is precarious in the highest degree. The state of the Russian law concerning land leases is very unsatisfactory, partly because the growth of leases is a new departure in our economic history, partly because every serious attempt to deal with the question is likely to sow discontent in the influential class, which is receiving rents and not paying them.

Even on his own land the peasant is often threatened with the loss of economic independence. With every year he is brought more and more under the influence of the money economy. Taxation is perhaps the chief compelling force in this direction. Then come local rates of different kinds and the leasehold rents. Some old peasant industries, such as home spinning and home weaving, are decaying; some new wants, such as tea or oil light, are gaining ground; and the peasant family must buy for cash what it formerly produced at home. Many families cannot afford to pay all that is demanded from them. They do not become landless paupers at once; but they move, and sometimes move very rapidly, towards

the border of pauperism. They may let the whole of their holding or a part of it to a happier neighbor. They may sell the live stock and the agricultural implements which they can best spare. The number of peasant households, with scanty stock or with no live stock at all has in many places increased in an alarming proportion, especially as a result of the numerous bad crops of the last fifteen years. They may send some members of the family into a town or into a factory, with the expectation that a substantial part of the wages here earned will be sent home to fill the gaps of the family budget. It is often surprising and touching to see how faithfully such hopes are fulfilled. From the poorest districts of Central Russia, tens and hundreds of thousands of peasant artisans (joiners, carpenters, masons, bricklayers, fullers) are going yearly to the richer or money-spending outskirts of the vast empire, and bringing back or sending considerable amounts of cash, which preserve their village households from utter ruin. Even the factory operatives in steady employment do not necessarily lose all connection with their native village. They may regularly send money to their country relatives; and they expect to get an old-age pension in return, in the form of support at home, when, broken by age or disease, they are thrown out from the factory. In a less advanced stage of evolution they leave their place for some weeks during harvest, and return to the country to help their family. Generations will pass before the last "tie between town and village"—which plays such a prominent part in the writings of recent Russian economists—is altogether broken. But it becomes broken at last, and the village feels heavily the separation. When any one loses, some one must gain. While many peasants fall into pauperism, other people rise to prosperity. And it is the number of the normal middle-sized peasant house-

holds that is always on the decrease. A lucky railway contractor on a small scale, a thriving publican (before the introduction of the state monopoly in the liquor trade), a clever middleman dealing in corn, wool, eggs, timber, remaining legally a peasant and member of a peasant community, can find his way to riches, while his neighbors are ruining themselves; and for a village money-lender no other situation can be more desirable. Thus important differences of interests and sentiments arise or multiply in the country life, taking the place of the former equality. Old combinations grow weaker, new social groups spring into existence. The traditional fabric of rural society is undergoing a process of disintegration, and it is exceedingly difficult to foretell or to guess what will be the ultimate result.

The answers to the crucial question concerning the future of the Russian peasantry were widely divergent, but the utmost gravity of the problem itself was seldom denied by anybody. And before attention was diverted from it, before public interest became absorbed in the recrudescence of bilateral political terrorism and in the little-expected war, it was largely the agrarian problem which divided the feeble currents and undercurrents of public opinion. Many well-meaning people could not give up the Slav village community, and continued to believe in the vitality of the old-fashioned peasant. The commoner became idealized. He was endowed with high moral qualities and with a natural bias towards social justice and Christian equality. All evils of rural life came from without, from the harsh pressure of a bad state, from the still worse influence of modern capitalism. If the village could be let alone, it would again return to its lost status of innocence and prosperity. There were also strong partisans of industrial socialism. They considered the traditional agrarian conditions as the chief

stumbling-block to the millennium of the *Zukunftsstaat.* The peasant was to be transformed into a factory workman or into an agricultural laborer, in order that political and economic progress might take place. The more enthusiastic upholders of this view foretold the imminent doom of the present rural régime. Moderate people preferred to abor for a gradual amelioration of the situation. And numerous pessimists despaired of the future of their country, where the rural population was so much behind the age, so insensible of their deprivation of civic rights and political activity.

An educated Russian breathes an air where old or antiquated institutions are mingled with elements of change and uncertainty. Many agrarian topics, which afford a mere antiquarian interest to a Western scholar, convey to a Russian a keen flavor of actuality, and therefore take a stronger hold on him. The views which he will form about the future of the village community, the vitality of the peasant proprietors, the merits of capitalist farming, may regulate in many ways his daily conduct. And, being eager to guess the result of the rural changes going on before his eyes, he looks for some clew to the riddle, wherever he may hope to find it. Thus he comes naturally to the history of more advanced nations, where similar conditions have prevailed in the more or less remote past, but where they gave way to modern arrangements. What have been the causes and the results of the rural revolution in the West? How far has it been of a universal character, and how far can it be avoided or modified in a society living in different circumstances? What has been the balance of good and evil during and after the change? And he resolves to study some points of Western agrarian history, though of a special and technical kind. In my own case it has been the legal history of the English customary tenure.

In the above remarks I have wished to point out some motives of a national kind which may lead a Russian to the study of English agrarian history, and thus to introduce a summary of the contents of a book which appeared last year in Russian, under the title *The English Village of the Tudor Period.*[1] My intention in this work was to trace the legal evolution of copyhold, chiefly during the time of the Tudors, and to determine how far the fate of the English peasant proprietors can be explained by the legal peculiarities of their tenure. During the last twenty years valuable works (some of them, indeed, classical) have created the history of the English feudal peasantry, which, in my opinion, may be considered now as written, at least in its broad outlines. But before the recent publications of Mr. Leadam the agrarian history of the important Tudor period remained an almost untrodden ground. Mr. Leadam did conspicuous service by putting some fundamental questions and by greatly enlarging our stock of trustworthy information. But, with all deference to this scholar, I am bound to confess that I have disagreed with him on many important points where I had to consider either his interpretations of the sources or his general views.

II. The Villein Pedigree of Copyhold.

The necessary starting-point of my essay was a study into the origins of copyhold tenure. The general idea of copyhold depends very much on the notion which one has of its pedigree. In this question there is no unanimity of learned opinion. I may point out three different views. Mr. Leadam denies every connection between

[1] Alexander Savine, *Angliyskaya Derevnya v Epokhye Tudorov*, Moscow, 1903, xiii, +485. Since Dr. Savine's valuable work in its Russian form is inaccessible to many students, we are glad to present the author's summary of the main results of his researches. [EDITOR'S NOTE.]

the customary and the base tenure. The later copyhold, according to him, was derived from the villein customary tenure which enjoyed a tolerable security in the Norman law books. There was not much room for change in the history of the customary tenure. Copyhold succeeded to the legal privileges of the *terra villana*, and firmly established its complete security in the fifteenth and sixteenth centuries. This is the reason why the agrarian changes of the Tudor period did no harm to the customary tenants. The unhappy tenants at will on the demesne were the only sufferers. They succeeded in title to the unfree serfs, whose holdings on the lord's demesne possessed a merely precarious character, and were called *bondagia* or *terrae nativae*. Since time immemorial base tenure and customary tenure were totally different. Mr. Leadam stands quite alone with these bold affirmations. Most specialists admit a close affinity between copyhold and base tenure, and refuse to discriminate between the serfs and villeins of the age of Bracton. The only true distinction is that between villein status and villein tenure. For Mr. Pollock the first copyholders were descendants or successors of freemen who held villein land and always enjoyed a considerable security of tenure. Copyholders of servile origin occur almost exclusively on the Celtic soil of the western counties, where personal serfdom left a deep trace on the base tenure. The western copyhold is mostly copyhold of imperfect tenure, either for years or for life. Mr. Vinogradoff and Mr. Maitland do not deny that people who had never been serfs might be found among the early copyholders. But they consider villeins holding villein land as the chief source of the later class of copyholders.

One cannot dismiss these discordant views as indifferent for a history of the Tudor copyhold. The indorse-

ment of any one of them necessarily involves important further admissions. If the later copyhold has nothing in common with personal serfdom and base tenure, it is useless to look in its history for elements of legal insecurity. Since the dawn of professional tradition the tenure existed under state tutelage, and at the Tudor time its legal protection grows almost superabundant. The explanation of the fate of the English peasants, according to this view, would not lie in the region of law. Mr. Pollock would be prepared to admit an insecurity in the Tudor copyhold, which arose from the base origin of the tenure; but he must repudiate, at least for the larger part of the English territory, any unfavorable influence of personal servitude. Mr. Vinogradoff and Mr. Maitland could easily acknowledge that later copyholders inherited some legal disabilities of the feudal villeins, and suffered from their original sin during the social struggles of the Tudor period.

In order to test the different views, I traced the development of the legal theory of copyhold. Walking in the steps of some eminent investigators, I went from the known to the unknown, from Blackstone to Bracton. There is no need to condense for English-speaking readers Blackstone's classical pages on copyhold tenure. It is sufficient to point out the strange contradiction in which he is involved. On the one side, immutability is proclaimed to be the essence of copyhold. It is impossible to create a new copyhold or to change the manorial custom, which always runs from time immemorial. On the other side, Blackstone is quite emphatic in his opinion that copyhold is descended from a very low origin; that is to say, from feudal villeinage. But a wide gulf exists between later copyhold and villein tenure. Both assertions of Blackstone cannot be indorsed. A choice must be made. Either copyhold was not derived from villein

tenure or villein tenure did not remain immutable during its transformation into copyhold.

A comparison with earlier legal theories shows which half of the dilemma is true. Coke and Norden are good representatives of the doctrine for the beginning of the seventeenth century. Coke speaks perhaps even more eloquently than Blackstone on the security of copyhold and on the power of manorial custom. But suspicions are aroused by this very eloquence. If the situation was beyond dispute, why did he write in such a spirited way? Was he not moved by a desire to win a dubious case? In some respects the copyholder of Coke has not yet attained the level of the Blackstonian statement. Thus the court decisions had not yet established the common law maximum for the arbitrary admission fine. And the difficulty for a copyholder to act independently in a common law court reveals itself from Coke's pages more clearly than from Blackstone's. This impression is not enfeebled after a study of the *Surveyor's Dialogue.* Norden strongly insists on the variety of manorial customs. Copyhold of inheritance is not the only type of customary tenure. Tenures for lives and for years are very common. Fines of admission are certain in few manors. Tenants for lives and for years always pay arbitrary fines. One goes back to Kitchin, and finds that a copyholder's position becomes still less favorable,—at any rate, less certain. Kitchin is very friendly to copyhold tenure. He speaks seriously about its ancient freedom and its venerable Anglo-Saxon descent. Nevertheless, he makes it perfectly clear that the legal doctrine was in his days in its period of formation, and that very essential parts of the later theory continued to be controversial. Some chapters of Kitchin may convey an impression that in his time copyholders lived under happier conditions than two centuries later. Thus, accord-

ing to his *Court Leete*, the lord can never augment the customary amount of the admission fine, and a copyholder can in some cases bring an assize of novel disseisin. On the other hand, Kitchin remains in doubt whether the copyholders enjoy the rights which became indisputable for Coke and Blackstone. He expresses contradictory opinions as to the possibility of a copyholder bringing an action of trespass against the lord, and even any real action of common law. He does not believe that every copyhold must go back beyond the memory of men. The lord can grant any land by copy; and eighty years of quiet seisin will prove a sufficient prescription, will convert the tenure into ordinary copyhold.

In an earlier tract, in Fitzherbert's *Surveyinge*, the manorial custom appears in a condition still less secure and settled. For Fitzherbert manorial customs are generally of later origin than the Norman Conquest. The lord has the right to augment both rent and fines. Absence of security for customary tenure forms a great obstacle to agricultural progress. The further back we go, the greater becomes the uncertainty and insecurity of copyhold in the professional tradition. The first appearance of copyhold tenure in the law books makes no exception to the general rule. Littleton is very short and sometimes very obscure on the subject of copyhold. One may read the celebrated section 77 over and over again, but little can be squeezed out of an assurance that a lord has no desire to infringe a reasonable custom. Littleton did not write the famous words about Danby and Brian; long before Professor Ashley, Butler had pointed out that the interpolation first appears in Redmayne's edition of 1528. Littleton could not have written the words in question, because in that very case of the Year Book (7 E. IV. 19) he expresses himself strongly against giving to the copyholder an action of trespass against

the lord. But there is another section in the *Tenures* much less known (82), which probably implies a meagre protection of copyhold by the common law court. Littleton says that, where the copyhold is of inheritance and the lord grants the land to a stranger, the heir can enter the tenement; and the custom of the manor may help him *in some cases* to bar the lord in his action of trespass. If this statement is correct, it means that, when a copyholder came into court with a complaint, the king's justices would not hear him, but they would condescend to protect him in some cases when he appeared as defendant. The line of conduct followed by the learned judges, through its very want of consequence, makes it highly probable that in the middle of the fifteenth century, the protection of copyholders was a new departure and a hazardous thing in the common law courts. The laconic brevity of both chapters devoted by Littleton to the copyhold tenure is not their only striking peculiarity. If they are compared with the much longer chapter on tenure *en villenage*, a decided family likeness between both tenures is evidently apparent. Suppose a copyholder and a freeman holding in villenage approached Littleton, and told him minutely the conditions of their tenures. I am not quite sure that it would have been an easy matter for him to say who was the copyholder, and who the *tenens in villenagio*.

Perhaps I may be entitled now to formulate the result. The retrogressive survey of the law books leads us from the copyhold to the tenure in villenage, and clearly leaves us under the impression that the doctrine of the immutability of manorial custom underwent many changes before it received the definitive shape which it received in Blackstone's *Commentaries* and *Considerations on Copyhold*. And, as our best authorities teach us that the typical holder of villein land at the feudal age was a villein

in blood, it becomes probable that unfree people were ancestors or predecessors of the copyholders.

The above inference as to the base origin of copyhold was drawn from literary sources. Will it sustain the ordeal of documentary evidence? Perhaps it will. I have made no special study of the feudal period, and I must confine myself here almost exclusively to the Tudor evidence. Base customary tenure was not very rare in the Tudor period. In my book (pp. 127, 128) I have quoted about forty manors where all or some customary tenures preserved the names of villein, bond, native. I could now augment the table by further examples from the *Valor Ecclesiasticus*. The term "villein" occurs only once in the table. The usual names for such tenures are "bond" and "native." Almost everywhere the base land forms a part of the customary tenement, and does not lie in the demesne of the manor. The bond customary tenements were very seldom marked by any peculiarity in the conditions of tenure. For the most part it was only a difference of name. And where any peculiarities in conditions of tenure can be stated (five cases in my evidence), in spite of them, the name of copyhold is clearly applied to bond tenure. In Raunds, Russenden, Higham Ferrers (Northamptonshire),[1] one part of the copyhold is called customary, the other bond. The holders of bond copyhold in four and probably in all five cases were in a worse condition than the rest of the tenants; but the difference is not necessarily between original freedom and original servitude. In Tunstead (Norfolk),[2] holders of bond copyhold pay more for an admission fine; but *five* kinds of copyhold and *four* amounts of admission fines exist in the manor. And the difference does not lie in the security of tenure. Bond copyholders

[1] P. R. O., Duchy of Lancaster, Miscellaneous Books, vol. 117, ff. 153–208, 26 Eliz.

[2] Duchy of Lancaster, Misc., 15/3, 6 Jac. I.

in the five cases pay more to the lord or enjoy shorter term of tenure, but there is no reason to affirm that they are less effectively protected by the king's justices. On the whole, bond or native tenure in the sixteenth century was surprisingly similar to an ordinary copyhold. Does that not point to a common origin?

The ordinary copyhold of the sixteenth century in certain localities preserved some clear traces of its old connection with personal serfdom. Copyholders were not rare among the last bondmen; and, if out of their body we put aside the landholders, almost all of them prove to be customary tenants. Some copyholders who were not called bondmen were subject to degrading personal obligations, and stood not much above the bondmen. Even a suspicion is aroused that they were bondmen or people who had attained freedom quite recently, and were still exhibiting the brand of serfdom. In some manors, copyholders did not enjoy full freedom of movement. They could not leave the manor without seigniorial permission under fear of forfeiture, and for the license they paid a chevage. In 23 Henry VII., Th. James, a customary tenant of the manor of Bradford, Somersetshire, paid 20*d.* for the license to live outside the manor; and, in 6 Henry VIII., J. Bowring forfeited his customary tenement because he did not stay within the manorial boundaries.[1] In the reign of Henry VIII. the lord of the manor of Romens fee, Oxfordshire, promised to grant a new copy to one of his copyholders on more favorable conditions. The promise was "to hold by new copy to him his wife and son duryng their lyves and the longer lyver of them and that they and every of them shuld have libertie to dwell at their will and pleasure at every place from their tenement."[2] The inference is very prob-

[1] *Selden Society*, xii. 160, 163, 164.

[2] *Star Chamber Proceedings*, Book 19, no. 318.

able that the copyholder had not enjoyed the liberty which was promised him in the new copy. In some manors compulsory reeve service was still imposed on the customary tenants. In Painswick, Gloucestershire, the copyhold was of inheritance; but the customary tenants had to choose a reeve, and to bear a corporate responsibility for his arrears in payment of seigniorial revenue.[1] At the same time in Stebbenhuth and Hackney the copyholders were obliged to present to the lord two candidates, who were to be of the richest sort, with an income at least equal to the whole amount of seigniorial revenue. In some places the redemption of blood continued to be demanded at a very late date. According to Dugdale, in 1654 heiresses of copyhold still paid their leyrwite and childwite of 5*s*., whenever their misconduct came to the lord's knowledge.[2]

Perhaps the strongest argument is found in the cases where an actual succession of copyhold to villein status and tenure can be established in a definite manor. Humberstone made a survey of the manor of Rolleston, Staffordshire, in 1558. He found 28 copyholders who possessed an estate of inheritance, and he added that they had been bondmen of old times. He quoted an old custumal (of a later date, however, than 1337) in which the tenants of the same 28 holdings were villeins performing week-work and paying chevage and merchet. Only one trace of old serfdom survived till Humberstone's time. The copyholders were still subject to reeve service.[3] We can compare four surveys of different dates for the manor of Almonbury.[4] In 13 Edward III., there were 30 freeholders, 23 *terminarii*, 9 natives. The last paid chevage, merchet, leyrwite. In 3 Henry VI. there were 50 free-

[1] Th. Croome, 15, 16, 28 Eliz. [2] Dugdale, *Warwickshire*, ii. 967.

[3] Duchy of Lancaster, Miscellaneous Books, vol. 109, f. 54.

[4] *Yorkshire Arch. Assoc. Journal*, ii. 1–34.

holders, 20 tenants at will. The former villeins are called bond tenants, and no change had occurred in their services. In 26 Elizabeth, 23 freeholders dwell in the manor. No tenants at will are mentioned, and it is not clear whether they disappeared or joined the class of copyholders. Some of the latter are stigmatized as copyholders of bond tenure, and these alone are subject to repair of the manorial mill. But, apparently, no other difference exists between the two groups of copyholders. And, though at least some of them succeeded to bondmen, the condition of all is very favorable. They have an estate of inheritance, a certain admission fine, full power to let their tenements. In 7 James I. the surveyor no longer makes a distinction between bond copyhold and ordinary copyhold. I do not see how Mr. Leadam will escape from the conclusion that all the copyholds in Rolleston and at least some customary holdings in Almonbury originated from bond tenure, or that all the copyholders in Rolleston and some copyholders in Almonbury were descendants of or successors to bondmen.

III. Manorial Customs and the Insecurity of Copyhold.

I have tried to establish a kind of filiation between villeinage and customary tenure, because, in my opinion, the pedigree of copyhold helps in the understanding of the legal nature of customary tenure at the time of the Tudors, when manorial custom became its regulating force, its life and soul, according to Coke's favorite expression. The Tudor government was not afraid to penetrate into the manorial precincts, but it did so only when custom was broken; and the chief intention of interference was the restoration of the reign of custom. An essay on Tudor copyhold must commence with a

study of manorial customs. The subject is not an easy one, as monographs are entirely missing. The student must himself find his way through the difficulties, and must ask a lenient hearing.

The evidence concerning manorial customs was scanty in my material. I was able to tabulate (pp. 145–148) my information only for two sides of the custom; namely, duration of tenure and character of admission fine. The number of manors is very limited, and they are unequally distributed over the country. They belong mostly to the western and southern counties. The central and eastern counties, which offer a greater interest, are represented very poorly in my table.

As to the duration of tenure the customs may be divided into three groups. In 17 Cornwall manors and in Hitchin, copies are granted for years, but with right of renewal, so that the tenure is very like an estate of inheritance. In 25 manors the copies convey an estate of inheritance. In 40 manors a copyhold is granted for life or lives. The number of manors is too small for general inferences to be made. But perhaps the list suffices to show that tenure for life or lives was very common, and that it was not confined to the western counties. For instance, in Hants it occurs in four out of the five cases in which my table gives the duration of tenure. On the contrary, in Gloucestershire customary estate of inheritance is almost as frequent as tenure for lives. I cannot indorse the opinion which finds in the conditions of tenure a marked contrast between the western counties and the rest of England.

I attribute a great significance to the frequency of customary estates for life. It may explain much in the decline of the English peasantry. In all manors where the copyhold was not of inheritance, the whole of the customary land escheated from time to time into the

lord's hands; and he could grant it to whomsoever he desired or else join it to his demesne. By mere lapse of time a very considerable percentage of peasant holdings could thus become a part of a large demesne or of a large farm, without the least infringement of common law or of local custom.

As to the character of the fine, in 28 manors of my table the fine was certain, and in 58 uncertain. In 48 cases both duration of tenure and character of fine could be ascertained. Out of the 25 manors with customary holdings for lives, in 3 cases only was the fine certain. Out of the 24 manors with customary holdings of inheritance, in 8 cases the fine was uncertain. Arbitrary fines occurred even more frequently than customary tenures for lives, and generally the insecurity which resulted from the transient character of tenure was strengthened by the insecurity which came from the uncertainty of the admission payments.

A Russian critic has attacked my views on the character of manorial custom. He went even so far as to deny any difference between estates for life and estates of inheritance. The former, he claimed, were not less secure than the latter; and the holdings were usually regranted in the copyholder's family. He did not attribute a great economic importance to the prevalence of arbitrary fines. He challenged my inference that manorial custom was not favorable to a majority of the customary tenants; and he affirmed, on the contrary, that in point of legal security the copyholder's condition left little to desire. I am afraid my opponent has made a strange mistake when he refuses to admit that the lord was not bound to regrant an escheated copyhold for lives to the tenant's descendants. It is absolutely impossible to consider all or almost all customary estates for lives as renewable. Law books, lawsuits, manorial documents, speak unanimously

against such a supposition. The subject had been a matter of controversy between Professor Ashley and Mr. Leadam; and Mr. Leadam admitted candidly that, as a matter of law, the lord could dispose freely of an escheated copyhold for lives. I have adduced in my book some further proofs of it, though, I suppose, they are needless for English-speaking readers. However, as a matter of fact, not all escheated copyholds for lives remained with the lord or went into a stranger's hands. Some of them were undoubtedly for a long time kept by the old tenant's family; and this I explicitly pointed out. In some manors the custom itself facilitated their preservation in the family. In Easterton, Garnham, Aledeborne, Maningforde Boundes, Poole, Wokesey (Wiltshire), according to a survey of 33 Elizabeth,[1] the steward was obliged by custom to grant the reversion of an escheated copyhold to the tenant's children before all others. But the children paid a fine at the lord's will; and, besides, the lord could retain the tenement in his own hands. A legal historian is satisfied with the statement that manorial customs opened the way to the disinherison of many peasant families. And I am bound to confess that I have stopped here. An economic historian wants to go farther, and to measure more or less exactly the actual changes produced by a legal rule. How many peasant families lost their holdings in such or such group of manors, owing to the limited duration of their customary interest? The problem is difficult. In order to resolve it, a great number of surveys and court rolls of different dates must be worked through, and even then success is not sure. I have consciously receded before the task. It is perhaps a substantial default in the book, and thus far my opponent's criticism may be just; but I hope the truth of my statements about the legal situation is not impaired by

[1] Duchy of Lancaster, Miscellaneous Books, vol. 115.

it. The same remark applies to the question of fines. Suppose the great frequency of arbitrary fines be established. But payments of arbitrary amounts may be quite low or, at any rate, not high enough to ruin a peasant family and to deprive it of the hereditary holding. A statistical investigation would decide what has been the amount of harm caused to the customary peasants by seigniorial exactions in cases of admission. I have adduced examples where the payments were exorbitant, amounting, indeed, to two, three, even four pounds per acre. However, such cases are rare; and a few examples do not prove much. The startling peculiarity of fines in my scanty material (pp. 465–470) is their inequality, or rather their capriciousness. I take a manor where the fines are low and where inequality of fines is less striking, as at Sapewike, Dorset.[1] For 33 acres of arable and 1½ acres of meadow J. Butte ap Ricke pays a fine of 6*s*. 8*d*., while for 18 acres of arable and 1 acre of meadow N. Scovell pays a fine of 100*s*. It seems difficult to avoid the conclusion that such inequality of treatment engendered a deep-rooted feeling of insecurity, even where the actual claims of the lord were not excessive. After all, the question of fines became ultimately a matter of secondary importance, since the king's courts established a legal maximum for an arbitrary fine, which cannot be considered as ruinous. But the limited duration of many customary tenures was, on the contrary, a permanent factor, with an influence more likely to increase than to diminish.

The effects of limited duration and arbitrary admittance payments were, to a large extent, counterbalanced by the fixity of customary rents. I need not dwell on a point which has been elucidated by the authoritative statements of Mr. Maitland and Mr. Seebohm. Copyhold rents be-

[1] Duchy of Lancaster, Miscellaneous Books, vol. 108, ff. 24–28, 6 E. VI.

came fixed at an early date, after the commutation of customary works, and, generally, much before the sixteenth-century revolution of prices. Therefore, in many cases they fell much below the rack rents imposed under the influence of the influx of the American and Tyrolese precious metals. After the monetary revolution, they lost in most cases all correspondence to the actual value of land, and became quit rents, in the modern sense of the word, leaving a large margin of profit to the tenant. The numberless pamphlets and sermons of the Tudor period which condemn the lamentable growth of rents hardly afford proof to the contrary. Apart from rhetorical and moralizing exaggerations, the preachers and pamphleteers are speaking about farms, and not about customary tenures. The very name of copyhold occurs very rarely in these eloquent complaints.

Copyhold rents remained fixed because they formed an integral part of the local custom; and the custom of the manor was supposed to go beyond the memory of man without any change. It was a legal fiction. Even customary rents had a definite commencement in men's memory, being usually a result of commutation; and, where the commutation took place gradually, the amount of rent changed with every consecutive step of the process. It was a dangerous idea. The test of stability and immemorial antiquity could be applied to every custom. It was applied to many of them; and many of them, unable to stand the test, fell into a very doubtful state. The situation becomes bad for the tenants when a customary rule is uncertain; and this is rather frequently the case in the sixteenth century. It may happen that neither the tenants nor the lord nor the law courts know the custom. The parties to the suit give contradictory depositions, and produce documents which exclude one another. The tenants always believe that the lord is

wrong. From the uncertainty of the custom, the lord is always inclined to argue that the tenants are at his will. In such suits the tenants are very apt to be the losing party. They are willing to make great pecuniary sacrifices in order to get their custom properly defined and authoritatively fixed. In 7 Elizabeth, Lord Berkeley confirmed to his tenants of Bosham their manorial custom by an indenture "which the tenants for the canonicalnes thereof called Bosham bible." The bible proved to be a very controversial book. In 14 James I. a suit was pending in the chancery between Lady Berkeley and her copyholders of Bosham; and the court abrogated the Elizabethan agreement. The case was not decided before 16 James I., and cost the tenants £900. The chancery decree was very unfavorable to the tenants, and broke their spirit. They were ready to pay about £2,000 "to redeem their folly."[1]

The situation might become worse for the tenants when their copyhold took its commencement within men's memory. The later legal theory declared that creation of copyhold was an impossibility. A copyhold on the demesne or on the wastes of the manor was not a perfect copyhold for a strict lawyer, because all demesne land was in the lord's hands within legal memory; and copies granted on the demesne land could therefore claim no immemorial antiquity. It was a late theory, and Littleton himself speaks about cases in which freehold could turn into customary land (s. 172). It often happened in the Tudor period that peasants took and that lords granted by copy, wastes and demesne lands. However, with the growth of the legal theory, the situation of such new copyhold or newhold became dangerous, and the insecurity was increasing. In some cases, to prevent the disinheritance of the unhappy tenants, special

[1] *Berkeley Manuscripts*, ii. 432–434.

acts of parliament were passed. The act for Somerset's lands[1] affords the best-known instance. In other manors special local customs empowered the lord to grant by copy the demesne, and declared that such grants established a copyhold of perfect tenure. But in numerous cases, the newholders could find no legal cover, and stood in peril of losing their tenements or of paying heavy sums of money for the confirmation of their interest.

The history of the Blackburn or Clitheroe tenants offers an eloquent illustration of the melancholy fate of many new copyholders. In 21 Henry VII. the king writes to the steward of Clitheroe, and complains that former stewards had been granting demesne lands by copy without royal license (Clitheroe was a parcel of the Duchy of Lancaster), and that such copies had no validity in law. The king does not allow the steward to grant demesne by copy for more than 40*s.* and twelve years. But in the next year special commissioners came to Blackburn with instructions to augment the king's revenue and with power to grant new copies without the recent limitations; and many such new copies were, in fact, granted. The newholders lived quietly during the sixteenth century. Only once the king interfered with their rights, when he forbade (24 Henry VIII.) partition of tenements whose value was under 26*s.* 8*d.* But in 1607 the council of the Duchy declared that Clitheroe newholds were no copyholds at all, and that they ought to be treated as assart lands. However, the tenants might apply to the council for the confirmation of their interest. New admissions were stopped. In 1608, the council demanded a twenty years' rent for the award. The tenants consented to pay a twelve years' rent. Both parties agreed on the sum of about £3,950. The newholders paid the money, and the chancellor of the Duchy prepared a bill which

[1] 2–3 E. VI., c. 12.

was supposed to secure forever the dubious tenures. The bill was passed; it was apparently 7 James I., c. 21. But it did not help the poor newholders. Their successors presented a petition to Charles II. They do not mention the act of 7 James I., c. 21. They say that under James the newholders agreed to pay a forty years' rent for the confirmation of their tenures, one-half for the chancellor's decree and one-half for the act of parliament. The chancellor gave his decree, and the tenants paid the first half. But the bill was not passed through both houses before 1641. It was during the Civil War, and the king had no leisure to give his assent to private bills. The bill became an act of parliament only in 1650, and the tenants paid the second half. After the Restoration the republican statutes were declared null, and the Clitheroe newholders once more became rightless. They applied to the king for the confirmation of their tenures.

Newholders were not the only victims of the legal theory and of the economic struggle of the Tudor time. During a certain period of time the *severed* copyholders also found themselves in imperilled condition. A copyholder's life was closely connected with the manor; and the manorial court was the only place where he could sell, let, inherit, or exchange his tenement. If the court disappeared or if the copyholder became severed from it, his situation could become critical. He retained all his customary rights, but without the court he could not realize them. The opinion prevailed in the sixteenth century that two freeholders were necessary for a manor. The manor which lost that minimum ceased to exist before the law, together with its court and its custom. A lord could grant away to a stranger the freehold of some or of all of his copyholds. The manor remained, but the customary tenements became severed from it and lost their courts.

Both cases occur rather frequently in Coke's and Croke's Reports, and command a considerable interest because the history of the severed copyholders covers, to a great extent, that of the customary court and of the reputed manor. Mr. Maitland's and Mr. Vinogradoff's investigations have established the original unity of the manorial court and the late date of its differentiation. I should like to add only one supplementary touch to Mr. Maitland's masterly sketch in the second volume of the Selden Society publications. Even at the Tudor epoch the manorial court, as a general rule, preserved its original unity, and continued to be called court baron. My impression is that the doctrine concerning customary court and reputed manors, which is emerging in Kitchin and Coke, was construed to deal with exceptional cases and to save the endangered rights of the severed copyholders. Kitchin mentions the customary court, when he comes to the manor without freeholders. Coke insists on the dual nature of the manorial court, when he meets the same kind of manor, and when he wants to prove that copyholders preserve therein their immemorial rights.[1] But the instructive reports of Coke and Croke show that the doctrine was accepted by the law courts only after many vacillations, and that at the very end of the sixteenth century the severed copyholders at best enjoyed but partial recognition of their tenurial rights. The limits of a summary forbid a technical discussion of the respective reports; and I prefer to leave without proof the assertion that the severed copyholders stood in the ranks of those customary tenants who were not sufficiently protected by the manorial custom of the Tudor period.

[1]Kitchin, 87, 89, ed. of 1592; Coke, *Commentary*, 31.

IV. The Legal Protection of Copyhold.

Many customs do not need state protection. They are enforced, not because the state demands their preservation, but because their maintenance is necessary or profitable to influential elements of the local population. The feudal state did not protect, or protected very inefficiently, the manorial customs. Yet the latter existed in full vigor, because the lord, as well as the peasants, was interested in their maintenance. Towards the time of the Tudors, manorial custom lost its charm for the seigniorial mind. Demesne farming declined or disappeared. A lord expected money from his tenants, and nothing else. He became indifferent to the condition of their horses and ploughs, of their meadows and crops, since they ceased to cultivate his fields. The custom became rather a nuisance to him, for it fixed many payments and prevented him from raising his revenue. Tenure of common law, especially tenure at will, seemed preferable to copyhold, because rack rents stood above the quit rents. With a common law leasehold the admission fine was always arbitrary; and with a copyhold it might be fixed by custom. The "economic man" in an average lord was bound to dislike custom, and to wish the substitution of common law tenures for customary estates. The same desire was felt by a large farmer or grazier who wanted considerable areas of land for himself, and could not get them, owing to the great extent of customary tenements. Thus some leading social forces might be hostile to the manorial custom, and feel inclined to evade it, or even to crush it at the first opportunity. Protection of customary estates by the law courts acquired an importance under the Tudors which it had not possessed during the feudal epoch. The question is rather obscure. Perhaps the most convenient

way to deal with the subject will be to treat each court of law separately.

After some vacillations the opinion asserted itself in the thirteenth century that all matters concerning villein or customary tenure lay outside the jurisdiction of the common law, and ought to be disposed of by manorial or seigniorial justice. If the same state of things had remained in force under the Tudors, it would have been a disaster for the English peasantry, which would have disappeared considerably earlier than it did. The situation, however, had changed. Customary tenants of the sixteenth century stood under state protection, and suits concerning copyhold were often brought before the king's judges. A Tudor copyholder could complain of many things. But he could not affirm that the doors of a court of law were shut to him, and that justice spoke to him only by the mouth of a hostile steward in the unfriendly precincts of a manorial hall. The history of a change of such magnitude is not devoid of interest. The professional tradition usually ascribes the honor of establishing or renewing the protection of customary tenure to the famous decisions of Danby and Brian. The tradition does not ignore the fact that their action, real or imaginary, was anticipated by the subpœnas and decrees of the Lancastrian chancellors; but it does not attribute much significance to the circumstance. This question of chancery jurisdiction, however, deserved more attention than could be paid to it till now. The proof is contained in the early chancery proceedings, which became accessible after the recent publication of the Calendar. I have already reported[1] the eleven copyhold cases which I found in the first volume.

Thirteen more cases are registered in the second volume, which I need not here discuss, for they possess few

[1] *English Historical Review*, vol. xvii.

peculiar traits. However, I have perhaps to withdraw my former statement that no copyhold cases are known as early as the fourteenth century. A suit is registered in the second volume, which relates to the fourteenth year of Richard II., and has an indirect relation to customary tenure.[1] The bill of the plaintiff in Latin is the only document preserved; and, curiously enough, a manorial lord appears as plaintiff. One more copyhold case may belong to the fourteenth century; for the bill, the only document preserved, is written[2] in French, whereas proceedings of later date were kept in English. The importance of the evidence is due to the circumstance that no other contemporary royal court protected customary tenure. Copyholders affirm several times in their chancery bills that they are helpless at common law, and that chancery is the only place where they can expect justice to be done to them. The assertion is repeated in a very late case,[3] which cannot be earlier than 12 Edward IV. At least five years had then passed since the famous occasion upon which Danby is generally supposed to have established a copyholder's ability to sue his lord at common law. Yet John Wade, the plaintiff, can still lament in his bill, "seyng your suppliaunt to be an innocent person . . . by color that is conteyned in his copy *tenendum sibi et heredibus suis ad voluntatem domini* in which case your seid suppliaunt can have no remedy ayenst his saide lorde by the course of the comen lawe of this lande." I do not consider the declaration as an antiquated formula superseded by a new development in the jurisdiction of the Common Bench. The wording of such declarations varied considerably, and the defendants never contended that the matter had its remedy at common law. The chancery decrees for the fifteenth century are lost; and

[1] P. R. O., *Early Chancery Proceedings*, ii., bdle. 69, no. 3.

[2] *Ibid.*, bdle. 69, no. 301. [3] *Ibid.*, bdle. 40, nos. 90–93.

we cannot say how often the copyholders gained their case and what was the character of the satisfaction they received. In their bills they expected from the court, not a mere adjudication of their pecuniary losses, as in a common law action of trespass, but restitution of tenure. The defendants did not consider the proceedings as an innocent formality, but prepared elaborate answers and rejoinders. The immediate influence of the chancery protection on the fate of the fifteenth-century copyholders must not be exaggerated. The total number of chancery pleas amounts to very many thousands, and the copyhold bills are some two dozens. In their collisions with the lord the Lancastrian copyholders very seldom found their way to the chancellor. However, the principle of state protection becomes established by a very limited number of decisions, as well as by hundreds and thousands of cases; and the principle was of far-reaching importance. The rare copyhold cases in the chancery practice of the fifteenth century cleared the ground for the Tudor law courts, and laid the foundation stone of the later "security" of the customary tenure.

Danby and Brian were not the first judges who consented to hear a copyholder's complaint against the lord, and who proclaimed themselves ready to give eventually a judgment for the plaintiff. Were they the first justices who gave to a copyholder a common law action against the lord? The matter is rather dubious. Our evidence in reality consists but of the short and obscure reports in the Year Book.[1] Mr. Leadam has given an explanation of them (in the Transactions of the Royal Historical Society), to which, for several reasons, I can not adhere. In the first case, out of four lawyers, only one, Danby, is prepared to protect a copyholder of *inheritance* against the lord. Littleton speaks in strong opposition to Danby.

[1] 7 E. IV. 19; 21 E. IV. 80.

Danby's reply to Littleton is very obscure. And, when the chief justice tries to support his opinion by the analogy of a freeholder disseised by the king, Catesby and Pigot have little trouble to show that the analogy is false. Danby's rejoinder is also obscure; but, at any rate, he sounds a retreat, and speaks not of tenure, but of recovery of profits by way of damages. Catesby meets him again with a decided denial, and here the report ends. No judgment is mentioned, and the professional opinion seems to speak against the protection of the copyholders. In the second case the judges are more favorable to customary tenure. The court agreed with Brian that a copyholder for life has a customary freehold in the land. The court accepted the defence of the copyholder, who pointed out that he had performed all the customary services. Catesby had changed his mind since 7 Edward IV., and held that a copyholder could prescribe according to the custom. But the report ends with a demurrer. It does not give the final decision. These reports did not acquire at once the importance which is attributed to them in the legal tradition. Brook and Kitchin speak of them in a way which differs considerably from the later views. In 21 Henry VII., a copyholder's ability to prescribe according to the manorial custom remained a controversial point for the justices, and only in the following year did the Common Bench give a unanimous decision in favor of the copyholder.[1]

A tenant's complaint against the lord was not the only channel through which the manorial custom could come under the cognizance of a common law court. Even in the so-called Danby and Brian cases the lord acts as plaintiff and the copyholder as defendant. Similar cases occurred at a much earlier date,[2] and the earliest copyhold case in the chancery proceedings is of the same kind.

[1] Keilwey, *Reports*, 76, 77. [2] 8 H. V. 4; 42 E. III 25.

A weak lord, who could not enforce the custom or impose his will upon an obstinate tenant, applied for help to the king's court, hardly suspecting the magnitude of the issue which he was raising. The justices might help an individual; but they were encroaching thereby on the privileges of the seigniorial class. The proceedings almost invariably resulted in a discussion of the manorial custom, which thus placed itself under the control of the common law. To the judges the change was not difficult. When they began to protect the customary tenant, they did but follow an example set by the chancellors. Besides, they would not wish to abandon to the equity men a new branch of work which could prove an abundant source of professional income. The scarcity of reports from the first part of the sixteenth century makes it difficult to trace the consecutive steps through which the manorial custom rose to full recognition in common law. Under Elizabeth, when the stream of reports grows copious again, the "reception" was finished. Custom was universally considered as the corner-stone of the legal life in the manor. The seigniorial will retained its freedom of action only where not limited by the custom. "Lord of the manor" and "instrument of the custom" soon became interchangeable terms. And the process did not always stop there. The lawyers could assert that every custom ought to be reasonable, and sometimes they might put the maxim into practice. The most important instance of its application was the introduction of the legal maximum for the arbitrary admittance fines. An historical survey of this change was afforded by Lord Loughborough in *Grant* v. *Astle*,[1] in which two years' improved value was found to represent the maximum for an arbitrary fine. The case acquired a wide reputation, though it did not settle the question. At so recent a date as

[1] Douglas, *Reports*, 722-723.

1883 the Queen's Bench Division stated that three years' value was not an unreasonable fine in a Worcestershire manor. And Lord Loughborough's historical introduction is not quite correct. The Tudor and Stuart justices were slower to establish a maximum than he affirms; and they emphatically excepted cases of voluntary grant, in which the lord counted for more than a mere instrument of custom.

After all, a prudent reverence for tradition was a stronger motive with the Tudor lawyers than an ambitious pretension to recast the custom in the name of state interest or reason. "Reception," not reform, of the local customs became the chief consequence of state interference in the manorial life. The manorial customary organization, which acquired its definite form during the thirteenth to fifteenth centuries,—lord, steward, bailiff, by-laws, copyholders, court leet, court baron, with its jurors and rolls and copies,—experienced its "reception" by the common law, at a time when the breath of life began to depart from it. The king's justices introduced a few improvements into the decaying organization, but their principal care was to preserve it in the old condition. Down to the present day the custom of a manor remains an invariable quantity to a legal mind. The establishment of state interference proved very favorable to many copyholders, not because it created some new rules, but because it fixed the old ones. The legal security of copyholders after that depended on the character of the custom. Copyholders of inheritance paying a fine certain and enjoying extensive rights of common occupied, indeed, an enviable position. But if the custom had carved out a meagre slice of rights to the tenants, the latter gained little by the "reception," which only prevented a further deterioration in conditions of tenure.

And have I not forgotten the Court of Requests and

the Star Chamber? On the contrary, I have paid due attention to Mr. Leadam's well-known opinions; and I have dissociated myself from them after a consideration of his evidence. At first, Mr. Leadam's point of view looks very plausible. The Star Chamber and the Court of Requests were new courts of equity, which might move without constant regard to the strict traditions of the common law courts. Both tribunals had an intimate connection with the Privy Council. It seems natural that they should command great respect and develop a bold activity under the cover of that powerful body. The Court of Requests bore the honorable name of the "court of poor men's causes." Two famous Tudor statesmen were accused of or accredited with strong democratic tendencies, and both were said to have chosen that very court for the chief instrument of their popular policy. Mr. Leadam would certainly be right if the question were solved by such general considerations, and not by the records of these courts, for the publication of which he has done so much, and will do more. To my mind, that small part of the evidence which I was able to study does not bear out Mr. Leadam's democratic theory.

In the twelfth volume of the Selden Society publications, Mr. Leadam has edited, among others, two very important copyhold cases in the Court of Requests, *Kent* v. *Seynt John* and *Foreacre* v. *Frauncys*. I shall try to summarize the proceedings in the shortest possible way. The tenants of Abbot Ripton complained in 35 Henry VIII. that their lord by brute force took copies from some of them, and substituted forty-year leases in the place of the customary tenures. The lord answered that the copies in question were but twenty years old, and that the plaintiffs were therefore mere tenants at will. The court nominated two commissioners, and drew up a list of interrogatories. The commissioners went to Abbot

Ripton, and produced the interrogatories to the sworn witnesses for both parties. No cross-examination could take place, and the depositions were simply put down on the parchment in the nakedness of their crying contradictions. The evidence collected was returned to the court, which, naturally enough, could not decipher the riddle. Supplementary depositions of the same kind made at Whitehall helped little. But the court had to do something to get out of the difficulty. The commissioners were ordered to search the manorial archives and to collect the documentary evidence. They performed the work, and the text of the old court rolls (those of Richard II. were quoted) became the arbiter of the contradictory claims. It was found that no copies emanated from an earlier date than 21 Edward IV., and that the majority of them related to 26 Henry VIII. The court decided accordingly that the copyhold was new and of no validity in law, and that the tenants ought to forfeit their holdings. It is necessary to add that their lordships took care to save the tenants from utter ruin. They wrote to the lord asking that he grant to the tenants leases for years, and he kindly consented. But one remembers that before any intervention on the part of the court, the lord proposed to substitute forty-year leases for copies. The request of the councillors agreed admirably with the lord's own calculations. Far from me to affirm that the court proceedings were contrary to right or prejudicial to the tenants. The only thing I wish to point out is that the methods of the court do not corroborate Mr. Leadam's theory. The Court of Requests desires to restore the custom, not to mend it. The Court of Requests looks for truth, not in the *Rechtsbewusstsein* of the local population, but in the dust of the manorial records; and, even when offering the tenants a benevolent protection, the court treats the lord's inter-

est in the most delicate manner. The tenants of Bradford, Somersetshire, complained in 35 Henry VIII. that their lord was breaking in many ways the manorial custom. The plaintiffs asserted that they had an estate of inheritance, and that they ought to pay fines certain. The lord answered that some tenements lay on the overland, and therefore outside the dominion of custom, and that the others had to fine at the lord's will, and were partly mere estates for life. The court sent commissioners to Bradford, who collected the depositions, and forwarded them to London. The depositions contradicted one another, and the court preferred the guidance of the excerpts from old court rolls quoted in the lord's replication. The dead letter of the records spoke again in the lord's favor. And the court found that the fines were arbitrary, that the tenants could not alienate their lands without seigniorial license, that overland was held at the lord's will. The tenants are patronized again, and again a careful attention is paid to social rank. The lord is to forgive his tenants according to their lordships' desire and entreaty.

We hear from different quarters that under Somerset's protectorate the Court of Requests was used for the promotion of a democratic policy. I examined a case of 2 Edward VI.,[1] in order to see what the attitude of the court had become, and I found it exactly the same as in the preceding reign. In 2 Edward VI. the commissioners showed, perhaps, an even more pronounced preference for the old documents as against the voices of the local peasantry. I do not know whether the witnesses spoke honestly or not. At any rate, they asserted unanimously that the customary estates were hereditary in the manor of Hanbury, and that the fines were certain. The commissioners neglected the depositions, and based

[1] *Court of Request Proceedings*, bdle. 16, no. 39.

their report upon the excerpts from the court rolls. They found that copies were always granted for life, and that fines were arbitrary. Their interpretation of the court rolls is decidedly unfavorable to the copyholders. The commissioners might have been right as to the duration of tenure. But on the question of fines they drew their conclusion apparently from the silence of the rolls. Their excerpts do not mention the amount of the fines. The decrees of the Court of Requests are lost for the first five years of Edward VI. I am afraid that in *Alyngton* v. *Hynkes* the decision was against the copyholders.

I cannot discover in these examples the high-handed democratic policy Mr. Leadam speaks of. I do not deny, in the least, that the court could effectively protect the tenants, provided the lord was clearly breaking an incontestable manorial custom. But the court meant to enforce the rule of custom, not to shake it; and it had more faith in records dead than in men alive. When an ancient, perhaps hardly legible, court roll spoke against the copyholders, the new court of justice could help them no more than the old ones.

My opinion was not modified by a study of some few Star Chamber proceedings. Disputes between lords and tenants were heard there not rarely. But the plaintiffs are not always tenants. The Chamber did not possess the democratic reputation of the Court of Requests, as it stood chiefly for the guard of state interest and public order. Weak lords, who could not live in peace with their tenants, readily saw an "illegal combination" in every act of organized opposition, and could inform the Chamber that public security was in danger. And not always in vain. Moore (pl. 1088) has reported a case of 4 James I. in which the court forbade to the tenants all collective action if the manorial custom was in controversy. However, numerous instances can be shown

in which the tenants appear as plaintiffs and the lords as defendants. But what reasons have we to think that the Star Chamber procedure was more favorable to copyholders than that of the Court of Requests? A good example will make clear the influence of the court. I select the endless Thingden litigations to which Mr. Leadam had so aptly called the attention of specialists. The Star Chamber proceedings form a considerable part of my evidence.[1] For shortness' sake I shall omit the suits *Mulsho* v. *Selby* and *vice versa*, confining myself to the litigations of the other tenants. Selby, I may mention, was the most prominent of the Thingden tenants, and Mulsho was the local lord.

The Thingden disputes commenced probably in 4 Henry VII., when Mulsho made his first inclosures and conversions. The tenants brought a bill in the Star Chamber, and won their case. In 9 Henry VII. or, perhaps, in 11 Henry VII., if not in both years, the court ordered Mulsho to put down the inclosures and to respect the tenants' rights of common. The triumph of the tenantry did not last long. Either Mulsho neglected altogether to execute the decree or he might have made new inclosures. At any rate, the peasants repeat their former complaints in the new reign before the same court. But this time the Star Chamber decree ran contrary to their expectations. Though further encroachments were forbidden, Mulsho was allowed to retain the area inclosed for his exclusive use. Litigation recommenced in 18 Henry VIII. In the opinion of the copyholders, Mulsho was infringing the manorial custom by demanding unreasonable and excessive fines. They thought that their land was ancient demesne, on which a certain fine, one year's rent, had to be assessed for an estate of inheritance.

[1] Gardiner, *L. and P.*, vi. 1383; *Star Chamber Proceedings*, bdle. 17, no. 396, bdle. 26, nos. 250 and 359, bdle. 32, no. 70; *Court of Requests Proceedings*, bdle. 6, no. 128, bdle. 8, nos. 86 and 187, Books, vol. 5, no. 135.

A royal letter, dated February 15, 18 Henry VIII., forbade changing the old fines. It was apparently a victory for the customary tenants. But in 20 Henry VIII. they complain again of oppressive fines, this time to the Court of Requests. Mulsho answered the bill by exhibiting a collection of old court rolls and custumals, from which it appeared that the fine, though reasonable, had been always at the lord's will. And the decree, dated November 20, 21 Henry VIII., was based on the old records adduced. The admittance fine, according to the precedents, ought to be determined by the reasonable will of the lord. To console the tenants, the decree added that the lord's steward would answer before the court for his assessments. It looks as if at the same time the case, *Tenants of Thingden* v. *Mulsho*, was heard before two more tribunals, the Star Chamber and the Chancery. In 20 Henry VIII. the whole township wrote to the Star Chamber about excessive fines, inclosures of pasture, overcharging of commons. Commissioners were sent to Thingden, and both parties agreed to accept their award. The freeholders complained separately of inclosures. One of them, the abbot of Croxton, addressed a bill to the chancellor. Some years later Mulsho spoke very bitterly of Wolsey's interference. Without entering into any judicial investigation, the chancellor ordered the sheriff to repair to Thingden with the whole *posse comitatus*, and to destroy the inclosures. The peasants helped the sheriff with a natural zeal, and during eight days were felling Mulsho's wood and timber, which had grown since 4 Henry VII. under the cover of the hedges. Their spirits rose. They did not allow Mulsho to impound their cattle, which were eating the seigniorial meadow. They boasted they had a common purse, and could spend £400 in litigation. Then Mulsho accused them before the Star Chamber of mutiny and illegal combination.

Wolsey had fallen, and Mulsho had hopes of success. He did, in fact, get the upper hand. Somewhat later the Thingden tenants applied to Cromwell with a humble supplication and complaint. We hear that Mulsho has seized five-sixths of their lands, and continued to assess unreasonable fines. In a private letter, Cromwell ordered Mulsho's steward to settle the affair. But the steward was in no great hurry to act against his lord, and, playing the *frondeur*, declared that Cromwell's letter meant no command.

For Mr. Leadam it is a picture of complete legal security. The copyholders apply to different courts of justice, and no one refuses to consider their claims. They may be protected by the chancellor in a high-handed way, without due regard to the lord's interest. The tenants show a dogged obstinacy in defending their rights. They address their complaints to many courts at once. They are not discouraged by defeats. They spend very liberally both their time and their money upon endless litigation. Just so. But the other side of the picture is, perhaps, still more impressive. A large peasant community (Mulsho lamented that more than sixty husbandmen were felling his wood), without distinction of freehold and copyhold, for many years goes on fighting one man,—the lord. The game is very expensive. It may offer temporary satisfaction, as when the chancellor orders the pulling down of the lord's hedges. But this success was due to Wolsey's inclosure policy, not to the security of the tenants' rights; and with Wolsey it passes away. Some years later the tenants could say that Mulsho held five-sixths of the whole land. As to the dispute about custom, the result is hardly more favorable to the copyholders. Their indignation was aroused by the new and heavy demands of the lord, and they clung to the persuasion that Thingden was ancient demesne.

Once encamped, they reveal a peasant incapacity to shift their position. In the mean time the courts of justice, old and new, profess that their chief duty is to find out and to protect the local custom which lies hidden in the manorial records. In Thingden, and in many other places, the lord is invincible on this ground of written tradition. He knows it, and he can always repulse the tenants' attack with the excerpts from the old court rolls. And the peasants have no desire to understand it. They attribute their defeats to the partiality of judges, jurors, commissioners. And so they go from one court to another. Their obstinacy was due to legal ignorance, not to legal security, and could easily aggravate their destiny.

If the custom had created a bad situation for the tenants, it was necessary to destroy the custom or to mend it, in order to help the tenants. The courts of justice, not excepting the new courts of equity, could not do it; for they felt too much reverence for tradition, and for the lord's interest. Was it not otherwise with the Privy Council? A body mainly administrative, of wide powers and great influence, ought to have more freedom in its dealings with custom. The *Acts of the Privy Council,* edited by Mr. Dasent, contain, for the second half of the century, much interesting information about agrarian history, and particularly about disputes between the lords and the customary tenants. The councillors many times promised themselves they would hear no more private litigations, and would remit all such cases to the law courts; but they could not always keep their word. Their methods in settling agrarian disputes in some respects differed from those of the Star Chamber and the Court of Requests. The chief end of their interference is rather the preservation of public order than the protection of custom. The councillors were prepared to deviate from the customary rules, if adherence to them meant danger

to the peace of Her Majesty. They were fond of peace-making. Their commissioners first of all tried to bring the litigants to agreement, to find an award acceptable to both. But this award the council imposed on the adversaries only in exceptional cases. The parties had, as a rule, to choose between arbitration and litigation. If they accepted the council's mediation, an award could modify considerably the old rural situation. If they repudiated it, the council ordered the plaintiff to wait for the legal decision, and rarely claimed the power to introduce new permanent legal regulation. In case of emergency the councillors might abrogate temporarily the rule of custom. Under ordinary circumstances they professed that custom ought to be faithfully maintained. 1587 was a year of dearth and of "doubtful tymes." Their lordships were advertised from Somersetshire that discontent was spreading as a result of Lord Sturton's inclosures. Without entering into the question of law, the councillors ordered Sturton to stop further inclosing.[1] At a quieter time the copyholders were reminded that they had to obey the steward, and to follow the old precedents of the manorial court.[2]

It is impossible to deny that in many cases the councillors wished to protect the customary tenants against seigniorial abuses. It is only just to add that they tried to do it with the least possible harm to seigniorial interests. They often sent letters to the lords with an admonition to be just or charitable. In their very reprimands they show a remarkable reserve. The tenants are spoken of as ignorant and weak minors under the council's tutelage, unable to hold their own. The great lords are courteously reminded that nobility and power impose duty of compassion for those below, even when guilty of bad conduct. A copyholder of Lord Berkeley, John Carney,

[1] *Acts of the Privy Council*, xiv. 305. [2] *Ibid.*, i. 292, 293.

several times complained before the council that he had been unjustly dispossessed of his tenement by the lord. In 1593 the councillors wrote to Berkeley. They confessed it was not their proper business to decide such causes; but they expressed a wish that, if any wrong had been done, Berkeley might commit the determination of the controversy to some local gentlemen of worth and understanding, without any suit at law. The supposition as to a possible wrong on the lord's side sounds innocent enough. It is curious to hear how delicately it was introduced. "Wherein we meane not to prejudicate your lordship or to conceive otherwise then honorablie of this and other your lordship's actions," etc.[1] Delicacy towards lords could go so far as to become very like injustice towards tenants. In 1573 the Privy Council heard a dispute between Chatterton, copyholder of the manor of Kemble, Wilts, and Sir T. Poole, apparently the local lord. The councillors wrote to Poole that Chatterton succeeded in proving his good title to the land. What was the inference? That Poole ought to return the copyhold to Chatterton and to pay the costs? By no means. The councillors have taken orders that Chatterton should submit to Poole, and desire his favor, and surrender the copy into Poole's hands on condition that Poole should grant him a good lease thereof for twenty-one years. Chatterton gets less than he should according to law and equity. But it seems much to the councillors; and they excuse to the lord their interference by explaining that this shall not only redound to Poole's great worship, but also shall discharge Poole's conscience, and bind Chatterton to pray for his lord.[2] May I adduce one more instance of extreme reverence for the seigniorial rights? In the seventies and eighties, the tenants of Glossopdale

[1] *Acts of the Privy Council*, xxiv. 315.

[2] *S. P. Dom. Eliz.*, Add., vol. 23, No. 38.

were involved in interminable disputes with their lord, the Earl of Shrewsbury. The councillors were much bothered with the matter, and wrote many times to the earl on behalf of the tenants. In November of 1579 they thanked Shrewsbury for his promise to yield the holdings to all tenants but four, whom the earl resolved to displace as "kindelers of that contention." The councillors did not know exactly what was the fault with the four excepted, but they could guess; and they wrote, "They do pray his lordship that their attendance here by their lordships' comandement may be no cause to move him to deale more hardly with them then with the reste."[1] The supreme governing body of the country had ordered a few peasants to appear before its board, and to give the necessary depositions. I do not know whether that was the true cause of Shrewsbury's anger. The council thought so. And is it not strange that the Privy Council courteously prays the lord not to be hard to the four tenants, because they obeyed the order of the Privy Council? Under such circumstances it was natural that the lords were not always inclined to fulfil the council's decrees in favor of the tenants. Great men, as Stafford, could meet the council's orders with fresh acts of violence.[2] Smaller people, as Mrs. Harper, could adopt a policy of silence.[3] I do not see how the Tudor privy councillors, at least the Elizabethan privy councillors, can be praised or condemned for strong democratic tendencies. They were certainly not, and no strong government can be, consciously hostile to the people. They were even less inclined to injure the country gentlemen. Perhaps they had less regard for manorial custom than the law courts had. They were fond of substituting new awards for old customary rules. But consent of

[1] *Acts of the Privy Council*, xi. 310.
[2] *Ibid.*, xi. 215, 216, 238; xii. 170.
[3] *Ibid.*, xii. 7, 45, 243; xiii. 26, 67.

both parties was the necessary condition of change. Without it the custom was maintained in full force.

After all, "reception" of custom and continuity of legal development give to my mind the keynote of the legal situation in the Tudor village. Some important amendments have to be introduced into this formula. Very many customs were submitted to the severe test of the legal theory of customary tenure, and by no means all passed successfully through the examination. The case of newhold may be considered as an important instance, in which custom often gave way to common law, and leases were substituted for copies. The examples of abrogated customs in England gain in significance, if they are compared with the agrarian development in Wales and on the Scotch border. I cannot here consider in detail the Tudor history of customary tenure on the frontier. I may observe, however, that both in Wales and in the North customary tenure was very common before the Tudors, and that it became scarce in later times. I venture to disagree with so high an authority as Mr. Seebohm in his optimistic view of the conditions in Wales. For him the change was an inevitable and a just adaptation of peculiar Cymric conditions to the new legal surroundings, and very often nothing but a literal translation of the old rules into the terms of common law. For me the same evidence points to a considerable break in the legal history, and reveals the influence of national disparity and economic struggle.

But, after all, the continuity of agrarian law, of which the English are justly proud, does not mean permanence of conditions. Land laws are or were, till recent times, less modern in England than in any European country. Rural life in England is farther from the old lines than in any European country. Manorial custom attained full recognition at the Tudor period, but did not save the

English peasantry. I have tried to show that in many, perhaps in the majority of manors, the custom itself was not favorable enough to the tenants, and that it was an important cause of later changes. But subsequent events showed that even a very favorable custom could not in England secure the peasants from ultimate economic death. Was it, perhaps, on the contrary, an indirect explanation of their disappearance? Agrarian revolutions on a large scale, partly from above, partly from below, took place in many continental countries, and, in the opinions of many, improved the position of the peasant proprietors. A deeply rooted reverence for local custom might have been one of the motives which detained the English from a thorough interference with the "natural" agrarian development. And they have seen the most striking rural changes which are known to a contemporary observer.

ALEXANDER SAVINE.